No. 226.

Percy Werner & Judson Harmon for P.

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IN THE Supreme Court of the United States.

OCTOBER TERM, 1898.

THE AMERICAN REFRIGERATOR TRANSIT COMPANY,
Plaintiff in Error,

vs.

FRANK HALL, TREASURER OF ARAPAHOE COUNTY, COLORADO,
Defendant in Error.

No. 226.

IN ERROR TO THE SUPREME COURT OF COLORADO.

PERCY WERNER,
Attorney for Plaintiff in Error.

JUDSON HARMON,
Of Counsel.

CENTRAL LAW JOURNAL CO., ST. LOUIS.

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Most of the general propositions of law stated by the learned counsel for the defendant in error, in his brief, we do not dispute. Some of them are too broadly stated, ignoring entirely the question of *situs*. Others are incomplete, because they treat the rule that merely being instruments of commerce does not exempt property from taxation as equivalent to one that such instruments may be taxed by the States, under all circumstances, whenever found therein.

But it is true that this case has to do with the application of well settled principles of law, to

a given state of facts. And it is in the application of these principles to the admitted facts in this case, which the counsel seeks to make, that we find the main source of our difference with him.

The key note of the argument of the counsel for the State of Colorado is struck in his quotation of the second clause of the stipulation of facts, and especially of the words "that the average number of cars of the plaintiff, used in the course of the business aforesaid within the State of Colorado during the year for which assessment was made, would equal forty." This, the learned counsel regards, as a fatal admission, and decisive of the case. He says: "This stipulation has an important bearing in determining the question of *situs* of this particular property when considered in the light of the authorities cited. It, in fact, brings the property directly within the reasoning of the Pullman Palace Car case, *supra*, and other authorities hereafter quoted."

The purpose of this stipulation we explained in our original brief. There is no pretense that any *average* amount of plaintiff in error's equipment was taxed in this case. But we have no desire to avoid the full force of this statement of fact. We regard it as altogether *immaterial* in the determination of the question of *situs* raised by the facts in this case. The learned counsel for the State regards it as *controlling*. The stipulation reads, "that the average number of cars of the plaintiff, *used in the course of the business aforesaid* within the State of Colorado during the year, would equal, etc." We regard the italicized words as the controlling feature of this case. The learned counsel argues that the fact

that there was *an* average number of cars used in the State during the year, irrespective of the character of the use, is sufficient of itself to confer the jurisdiction necessary to sustain the tax.

We feel confident that the authorities, to which we will shortly refer, clearly bear us out in our contention. But before adverting to them we desire to say that had the learned counsel appreciated the distinction, as he claims he cannot, between the word "during," as used in this stipulation, and "throughout," as used by this court in the Pullman case and other cases, perhaps he would not have been led into his, as we regard it, fallacious argument. The facts in the Pullman case did not show that that company had 300 cars in the State on one day, 10 on another, 50 on a third and none on a fourth, and so on, irregularly and intermittently, making an average during the year of 100, but, as said by the court (141, U. S. p. 26): "The route over which the cars travel extending beyond the limits of the State, particular cars may not remain within the State; but the company has *at all times* substantially the *same number* of cars within the State, and *continuously* and constantly uses there a portion of its property; and it is distinctly found, as matter of fact, that the company *continuously, throughout* the periods for which these taxes were levied, *carried on business in Pennsylvania* and had about one hundred cars within the State." From the beginning to the end of the opinion of the court in this often-quoted Pullman case, the word "average" is not once used. In the case at bar it is distinctly admitted that the cars of plaintiff in error "*never were run in said State in fixed numbers nor at regular times*," and

were only in the State in transit on voyages of interstate commerce, according as they were needed and routed by shippers in the "*varying* and *irregular* demands" for such cars in the business in which they were used. It is this difference between the facts in the case at bar and the facts in the Pullman case which the learned counsel fails to see, or, seeing, refuses to attach any importance thereto.

But, if we admit, for the mere purpose of argument, that there were *some* of plaintiff in error's cars somewhere within the limits of the State of Colorado *throughout* the year in question—but in transit, in use in the way described in the agreed facts, how does that alter the case?

To maintain his case counsel is bound to establish the proposition that mere occasional, irregular presence in a State, in transit only, of instruments of commerce among the States, whose owner is domiciled elsewhere and has no office and no contract or arrangement for regular or continuous business in or through such State, subject those instruments to taxation by that State; and that, if the decisions holding that constancy, permanency and regularity of quantity used in the State throughout the taxing period mean anthing at all, they may be met by figuring an average, which can of course always be done if property pass through the State but twice, and then holding the amount so found to have been actually in the State all the time.

That this process would subject the contents of cars to like taxation as well as the cars themselves, is obvious. Its results would be appalling. Such rule has no foundation in principle and no shadow of support except, perhaps, in passing remarks in

one or two opinions which were not meant to have any such scope by the judges who made them. Surely if mere actual presence in a State, in transit, gives it the right to tax, then this court has wasted a vast amount of time and reasoning about circumstances and conditions which were wholly immaterial.

In the case of Standard Oil Co. v. Bachelor, Treasurer, 89 Ind. 1, the Standard Oil Company had for a length of time been purchasing staves and piling them near a railroad track at one of the railway stations, and shipping, from time to time, from the accumulation on hand. The pile of staves stood in the assessor's district for over a year. Of necessity an *average* amount was on hand during the whole of this period. The local assessor undertook to list and assess the staves so piled up, and a tax was levied on the assessment, the collection of which was successfully enjoined. The Supreme Court of Indiana held that the staves were *in transitu*, and says: "Recognizing the rule as above stated by Burroughs, and as deducible from it, it must be held that personal property found in transit through, or temporarily within a State, other than the one in which the owner resides, cannot be taxed in the State in which it is so found, on the principle that for the purpose of taxation it belongs to the State in which the owner has his residence."

So, in State v. Engle, 34 N. J. L. 425, the course of business was to ship coal, mined in Pennsylvania, to Elizabethport in New Jersey, where it was deposited and separated according to its different sizes, and, when a cargo of one size was obtained, it was shipped to market. Some *average* amount

was always lying on the wharf awaiting shipment, but this fact did not prevent the application of the rule forbidding the taxation of goods in transit. And while in that case it does not appear that the assessor tried to ascertain this *average*, the court says, very significantly, as it appears to us: "If a tax may be laid on the quantity lying on the wharf when the assessment is made, why not tax every ton that is sent across the State throughout the year? If it may be laid on any property that is within the State at the time the assessment is usually made, it may be laid on all property that is brought within the State at all times of the year. A change in the tax law, as to the mode and time of assessment, is all that would be necesssary to accomplish that purpose."

And, in the later case of State v. Carrigan (39 N. J. L. 35), the same court applied the same rule to a similar state of facts, in which it clearly *did appear* that the *average* amount had been assessed. In this latter case the coal was shipped from Pennsylvania to tide-water at Port Johnson, N. J., where it was deposited in the dock for reshipment. Quoting from the opinion (p. 36): "The quantity of coal delivered in this way, in the course of a year, amounts to about one million five hundred thousand tons. The assessment complained of was on a valuation of $50,000, on which a tax of $1,100 was laid. The assessor testified that he made the assessment on the coal on the docks—lying on the docks and in the bins on the dock—that he estimated the quantity of coal at that time at fifty thousand tons, and took an estimate *from an average* of from ten thousand to twelve thousand tons *throughout* the year, and

obtained his valuation for taxation on that basis." The court then proceeded to declare the tax void, as being laid upon property in the course of transit across the State, holding that it had no *situs* within the State for the purpose of taxation.

In the case of State *ex rel.* Armour Packing Co. v. Stephens, Governor, *et al.*, recently decided by the Supreme Court of the State of Missouri, to which reference was made in our original brief, the opinion in which has since that brief was printed been published (see 48 S. W. Rep. 929), under the provisions of a law enacted by the Missouri Legislature in 1895, entitled "An act to provide for the assessment and taxation of railway cars other than those which are the property of railroad companies," an elaborate method was provided for the very purpose of ascertaining the *average number* of cars of each company, other than railway companies, whose cars passed into or through the State in each year. This was ascertained from the total aggregate number of miles traveled by the cars of each owner in the State during the year, and the daily average travel of such cars, and thence the number of cars required to make such aggregate mileage in one year. No method was provided to distinguish between mileage made by cars engaged in interstate commerce and cars engaged in purely local travel in the State. The proceeding was by *certiorari*, and the judges differed as to whether the jurisdiction of the State Board to assess should affirmatively appear on the face of the record; otherwise all seem to concur in the main opinion delivered by Marshall, J. In that case, which embraced the taxes levied for the years 1895 and 1896, the Armour Packing Com-

pany were assessed for 273 cars as the *average* number of its cars within the State for the year 1895, and for 216 cars as the *average* number within the State for the year 1896, such *averages* being ascertained in the manner above mentioned. Judge Marshall in the course of his opinion says (p. 934): "The relator is a corporation organized under the laws of the State of New Jersey, and is engaged at Kansas City, Mo., in the general packing business; that is, in killing and dressing food animals, and in selling the meats thereof. It owns a number of refrigerator cars in which it ships its goods to various counties in this State, and to other States in the Union. Its cars are hauled by various railroads."

"It appears from the petition that the relator's place of business is in Kansas City, in the State of Kansas, and that the cars here taxed are attached to its business, as an incident thereto, and are loaded in the State of Kansas, and shipped into and through the State of Missouri. These allegations are not denied by the return, and hence they must be taken as true in this case."

"Under the circumstances the relator, though a foreign corporation as to the State of Kansas, has acquired a domicile in that State and the cars can only be taxed in that State. Comstock v. Grand Rapids, Mich., 20 N. W. Rep. 624; City of Dubuque v. Ills. Central R. R. Co.,39 Iowa,83; British Commercial Life Ins. Co. v. Commissioners of Taxes, 31 N. Y. 32; Fargo v. State of Michigan, 121 U. S. 230; Pallman's Palace Car Co. v. Pennsylvania, 141 U. S. 18; Railway v. Backus, 154 U. S. 439; Cable Co. v. Adams, 155 U. S. 688; Adams Express Co. v. Kentucky, 166 U. S. 171; Hall v.

Transit Co., 51 Pac. Rep. 421; Weltz Assessm. §§ 49-51. *The reason of the rule is that the cars could not be reached for assessment and taxation any where else,* and the company owes this just return to the State of Kansas for the protection it receives from it. *The cars are in the State of Missouri only in transsitu, and have no situs in the State.* Hence they are not subject to assessment or taxation in this State. Fargo v. Michigan, 121 U. S. 230; California v. Northern Railway Co., 127 U. S. 1; Reading R. Co. v. Pennsylvania, 15 Wall. 232; People v. Wemple, 138 N. Y. 1; 2 Dill Mun. Corp., §§ 787, 738. *Being in Missouri only in transit, for the purpose of bringing merchandise from another State into or through this State, they are instruments of interstate commerce, and this State cannot impose any tax upon them.* Telegraph Co. v. Texas, 105 U. S. 460; Leloup v. Port of Mobile, 127 U. S. 640; Picard v. Car Co., 117 U. S. 34, Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196; Reading R. Co. v. Pennsylvania, 15 Wall. 232; Pullman Palace Car Co. v. Pennsylvania, 141 U. S. 18; Express Co. v. Seibert, 142 U. S. 339."

"Being instruments of interstate commerce, Congress alone has jurisdiction over them, under section 8, Art. I, Const. U. S., except, as above indicated, the cars can be taxed as property by the State in which the company has acquired a domicile and the cars have a *situs.*"

If the cars in question here had, under the agreed facts, a *situs* in the State of Colorado, such as had the Armour cars in the above case in the State of Kansas, we freely admit that the tax here in question would be valid. If, however, their use in the State of Colorado was the same as was the use

of the Armour cars, in the above case, in the State of Missouri, to-wit, *in transit* as instrumentalities of interstate commerce, which it is agreed was the case, then this tax is illegal and void under the above decision.

The fallacy of the contention of the learned counsel for the State of Colorado appears to us to be this, that he regards the fact of there having been *an average* number of cars in the State for a given year, sufficient *of itself* to determine the question of *situs*, and this is clearly not so. The only real signficance attaching to the *average* amount of goods or number of cars, or what not, which may be subject of taxation, is as determining what should fairly be the *amount* of the assessment. The *jurisdiction to tax* must lie further back, to-wit: in the purpose for which the property was brought into the State, whether for permanent local use, for sale in the markets of the State or otherwise.

Counsel complain that no showing is made that plaintiff in error pays taxes upon the cars here in question in the State of its domicile, the State of Illinois. Under the laws of Illinois, corporations like defendant in error are taxed on their entire possessions, based on the actual value of their capital stock, which is ascertained by the State Board of Equalization. (Chap. 120, Sec. 32 *et seq.;* Sec. 108, Rev. Stat. Ill. 1893). "Listing Capital Stock of Corporations and Franchises of Persons. § 32. Bridges, Express, etc., etc., and all other corporations and associations incorporated under the laws of this State, other than banks organized under any special or general law of the State, and the corporations required to be assessed by the local as-

sessors as hereinafter provided, shall, in addition to the other property required by this act to be listed, make out and deliver to the assessors, a sworn statement of the amount of the capital stock, setting forth particularly:"—name and location, number of shares, market or actual value of shares, amount of indebtedness, assessed valuation of tangible property. § 33. (Provides for transmission to State Board of Equalization.) § 108. "The State Board of Equalization shall assess the capital stock of each company or corporation, respectively, now or hereafter incorporated under the laws of this State, in the manner hereinbefore in this act provided. The respective assessments so made (other than of the capital stock of railroad and telegraph companies) shall be certified by the auditor, under direction of said board, to the county clerk of the respective counties in which such companies or associations are located, and said clerk shall extend the taxes for all purposes on the respective amounts so certified the same as may be levied on the other property in such towns, districts, villages or cities in which such companies or associations are located." The presumption is, of course, that plaintiff in error complied with the laws of its domicile. Even if it had not it would be liable therefor. But that fact is utterly immaterial here. As said by the court in Coe v. Errol (116 U. S. 517-524): "If the owner of personal property within a State resides in another State which taxes him for that property as a part of his general estate attached to his person, this action of the latter State does not in the least affect the right of the State in which the property is situated to tax it also. It is hardly necessary to cite author-

ities on a point so elementary." The same point was made in Morgan v. Parham, 16 Wall. 471, and the court said (p. 478): "Whether the steamer Frances was actually taxed in New York during the years 1866 and 1867 is not shown by the case. It is not important. She was liable to taxation there. That State alone had dominion over her for that purpose. Alabama had no more power to tax her or her owner than had Louisiana, or than Florida, Georgia and South Carolina would have had in the case I have supposed."

We respectfully submit that the tax in question, under the agreed facts, is illegal and void under Sec. 8 of Art. I, of the Federal Constitution, and that the judgment of the Supreme Court of Colorado should be reversed.

All of which is respectfully submitted,

PERCY WERNER,
Attorney for Plaintiff in Error.

JUDSON HARMON,
Of Counsel.